No. 20995

In the

United States Court of Appeals For the Ninth Circuit

GLYNN RICHARD DAVIS, and FLORENCE DAVIS, husband and wife,

Appellants,

v.

WYETH LABORATORIES, INC., a New York corporation, and AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation,

Appellees.

Appeal from the United States District Court for the District of Idaho Southern Division

PETITION FOR REHEARING

EBERLE & BERLIN
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Boise, Idaho 83705
Attorneys for Appellees

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COME NOW the Appellees, Wyeth Laboratories, Inc., and American Home Products Corporation, and petition this Honorable Court for a rehearing, *en banc*, in this cause and from the decision of this Court dated January 22, 1968, upon the following grounds:

I.

The opinion of the Court establishes new and far-reaching principles of law and public policy in public and private health programs which were neither fully briefed nor argued before the Court. This opinion should not be fully and finally established as the law without the court being more fully informed by the parties as to the effects of the decision.

II.

The Court erred in deciding that individual physicians can balance the risk with the advantage sought to be obtained from the taking of a vaccine for and on behalf of their individual patients, without imposing a separate duty upon the manufacturer, but that the collective judgment of those physicians that each individual in the population as a whole should take the vaccine imposes an additional and separate duty upon the manufacturer of the vaccine to warn each individual in the population that the judgment of the medical profession may be wrong as to any "risk" involved.

III.

The court erred in deciding that the manufacturer of a vaccine must ignore the decision by the best medical opinion in the area that there was no such medically cognizable risk involved as would make mass immunization clinics "unreasonably dangerous."

IV.

A. The Court erred in finding that the Sabin vaccine, administered to the Appellant, constitued an "experimentation in new drugs" and made of him a "human guinea pig" (Opinion of the Court, page 13). The opinion of the Court fails to recognize in such statements that the vaccine was developed after many years of testing and research, both clinically and in the laboratory, and was released to the general public by the Government only after it met all known standards for "safety, purity and potency."

B. The Court further erred in failing to give legal status to the medical society's evaluation of the risk from the vaccine, if any, to the population, of which the Appellant was an identifiable member in terms of possible risk, and to the finding of the medical society that the vaccine was "fit and its danger reasonable" as to each member of that population.

C. The Court erred in failing to recognize that Appellant was a member of a group (parents with young children) for which the Surgeon General's report specifically recommended vaccination. (See Surgeon General's report, page 5 of the Opinion.) At the time the vaccine was taken by Appellant, he had two children, ages four and six (Tr., pages 122-123).

V.

The opinion of the Court imposes a nondelegable duty upon the manufacturer to warn the ultimate consumer, which is inherently impracticable because of the inability of the manufacturer or its representative to be present at the time of the administration of the

vaccine to the ultimate consumer or to select the ultimate consumer. The drug manufacturer cannot, as a practical matter, control a medical society nor can the manufacturer compel or assure that the medical profession will inform the individual consumer sufficiently to enable him to intelligently evaluate the risk, if any.

VI.

The Court erred in leaving its determination open to the construction that, as a matter of law, no jury question *can* exist relating to *duty to warn* upon a retrial of this action, if such a retrial is finally ordered. Appellant argued *only* that a jury question was presented, and it would be unfair to refuse to allow Appellees to introduce evidence upon this question.

VII.

The Court erred in holding that any failure to warn exposes the vendor to strict liability in tort, without regard to the existence of a casual relationship between the failure to warn and the taking of the vaccine (Opinion of the Court, page 11, lines 23-27; page 16, lines 2-8). Even if Appellees did not warn Appellant, if it is shown that Appellant knew the risk, should have known the risk, or had he known the risk that he still would have taken the vaccine, liability should not be imposed upon Appellees. This Court has imposed liability in the absence of any causal relationship (Opinion of the Court, page 15).

VIII.

The majority opinion of the Court should be revised

on the basis of the following facts which are material and substantive to the matter and which Appellees believe the Court has erroneously omitted and misconstrued:

A. The campaign for the Idaho Falls Medical Society was managed by the Public Health Committee of that society, and specifically by Dr. John Casper, not by Franklin.

B. None of the forms for consent, tallies, and like documents, were taken from material published by Wyeth. Delivery of the vaccine to West Yellowstone was handled by Franklin under the direction of Dr. Casper and was handled by Franklin only insofar as it related to protecting the vaccine until time of use.

C. The printing of forms and immunization cards and posters relating to the polio clinics was handled solely by the medical society. On only one occasion did Franklin deliver material to a printer, but such material had been prepared by the medical society and Franklin acted only as a messenger.

D. The only meeting of doctors arranged by Franklin at his own insistence was instigated specifically for the purpose of making the contents of the Surgeon General's report on the risk of the vaccine known to the medical society. There is no evidence to support a finding that a "fact sheet" prepared by Appellees was in fact printed or used by the medical society in Idaho.

E. No newspaper clippings from Idaho newspapers referred to on page 7 of the Court's opinion contained any assurance by Wyeth relating to the safety of the vaccine. The statements referred to therein were made by members of the medical profession only. There was

no testimony that Appellant saw or read any of those newspaper articles.

F. The evidence shows without contradiction that Appellant examined the vaccine bottle containing a caution label and that the pharmacist himself examined the vaccine bottles, the boxes containing the vaccine, and the literature containing the warnings (Tr. pages 179-180).

WHEREFORE, it is respectfully prayed that the Court grant a rehearing in the above-entitled matter, and, because of the grave public questions presented concerning mass immunization of the public against disease, that this matter be heard before the court *en banc*.

Respectfully submitted

EBERLE & BERLIN

By_____

_____

A Member of the Firm
Attorneys for Appellees
Boise, Idaho

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing in my judgment is well founded on the grounds set forth therein, and that the petition is not interposed for delay.

_____

Attorney for Appellees

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of March, 1968, I mailed a true copy of the foregoing Petition for Rehearing to : Elam, Burke, Jeppesen & Evans, Attorneys at Law, Bank of Idaho Building, Boise, Idaho.

William C. Roden
Attorney for Appellees